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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 00 270 51366

Office: VERMONT SERVICE CENTER

Date:

FEB 06 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2).

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

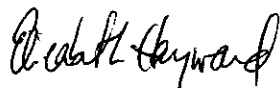
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability. The petitioner is a dance company that seeks to employ the beneficiary as its artistic director. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as an alien of exceptional ability, and that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided is whether the beneficiary qualifies for the classification sought. The petitioner does not claim that the beneficiary is a member of the professions, or that the beneficiary holds an advanced degree or its equivalent. Therefore, the petitioner must show that the beneficiary qualifies as an alien of exceptional ability. The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note that the regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example,

every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows “exceptional” traits.

Initially, the petitioner did not specify which of the six criteria the beneficiary purportedly satisfies. In response to a request for further evidence, counsel contends that the petitioner has satisfied the following three criteria. On appeal, counsel maintains that the petitioner has satisfied these same three criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The beneficiary holds a “Certificate of Professional Formation” from the School of Dance and Cultural Exchange (“EDEC,” the French acronym), Abidjan, Côte d’Ivoire, reflecting “4 years of professional formation” and “five years of training” at the school and at a dance group operated by the head of the school. This documentation appears to satisfy the criterion pertaining to education.

In response to a request for further evidence, the petitioner has submitted another certificate from EDEC. Counsel states that this certificate shows that the beneficiary earned a “degree as ‘artistic superior technician.’” The certificate itself is entitled “*Brevet de Technicien Supérieur Artistique*,” translated in the record as “Patent of Artistic Superior Technician.” The certificate refers to a “jury examination” on May 1, 1997, and indicates that the certificate was conferred in Abidjan on May 10, 1997. The pre-printed certificate is dated “1999,” with the final numeral “9” overwritten with a “7” in blue ink.

This certificate, variously dated 1997 and 1999, and supposedly issued in Abidjan, raises questions because, in the initial petition materials, the petitioner had repeatedly indicated that the beneficiary has been in the United States since November 23, 1991. A letter from Fareta School of Dance and Drum in New York City, indicates that the beneficiary “has been employed at Fareta School of Dance and Drum commencing October, 1992 to the present time, teaching two classes a day.” This letter is dated June 13, 1997, only six weeks after the purported jury examination at EDEC in Abidjan on May 1, 1997, yet it mentions neither the beneficiary’s absence nor his then-recent certification as an “Artistic Superior Technician.”

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The petitioner initially claimed that the beneficiary has been active in dance and cultural educational activities since late 1986. Counsel’s cover letter accompanying the petition lists the following “history of employment”:

Position: Dancer

Duration: one year, 1983

Employer: National Ballet of Ivory Coast.

Position: lead dancer

Duration: 1986-1991

Employer: 'Les Guirivoires' (Abidjan, Ivory Coast), an itinerant dance troupe which performs at cultural events in Europe, North America and African Countries.

Position: Master dancer/teacher/choreographer of traditional African dances.

Duration: 1992 to present

Employer: self.

Letters submitted with the initial filing of the petition attest to the beneficiary's employment in the United States, beginning in October 1992, less than eight years prior to the filing of the petition. None of the letters specifically attest to full-time employment, and some attest to one-time events such as training classes as a guest instructor at dance schools.

Subsequently, following the director's request for documentation of at least ten years of employment, the petitioner submitted a photocopied letter from Rose Marie Guirard, founder/director/owner of EDEC and director of Les Guirivoires dance group. The letter reads, in part, that the beneficiary "has been one of the finest performers of dance, choreography and acting from 12/1/1982 to 12/1/1992 at EDEC," thus attesting to exactly ten years of employment. This portion of the letter, however, appears to have been altered. The two lines of type containing this information are noticeably different in appearance from the rest of the letter, and faint lines are visible above, below, and to the right of those two lines. These artifacts would be consistent with new text having been cut out and pasted over a copy of the original letter, with the document in the record being a photocopy of this composite document.

Documentation submitted with the original petition indicates that the beneficiary danced with Ms. Guirard's group from November 1986 to October 1991. These dates are consistent with the beneficiary's November 1991 arrival in the United States, and with counsel's "employment history," but the newly claimed dates on the apparently altered letter are not. Furthermore, other material in the record indicates that the beneficiary began working at Fareta School of Dance and Drum "commencing October, 1992," meaning that the beneficiary could not have still been working thousands of miles away at EDEC in December 1992. Ms. Guirard's signature also appears on the 1997/1999 EDEC certificate.

The above inconsistencies, and apparent alterations, raise overall questions of credibility. Various assertions regarding the beneficiary's employment and whereabouts contradict one another; it is logically impossible for all of these claims to be true as stated. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The credibility issues discussed above, in conjunction with the fragmentary nature of the evidence regarding the beneficiary's employment, preclude a finding that the petitioner has persuasively established that the beneficiary had at least ten years of full-time experience in his field as of the petition's filing date.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The initial submission contained no specific claim that the beneficiary had won recognition for achievements and significant contributions. In response to the director's request for additional evidence, counsel lists the six evidentiary criteria, but instead of the above sixth criterion, counsel substitutes the phrase "evidence attesting to the exceptional character of the Beneficiary's artistic talent." This evidence includes publicity materials for appearances by the beneficiary, and "referral letters" from entities that have employed the beneficiary, rather than evidence of recognition showing that the beneficiary stands out among others in his field.

The director, in denying the petition, stated that "evidence of the beneficiary's work in the field" is not evidence of recognition for achievements and significant contributions. On appeal, counsel offers only one claim relating to "recognition by professional organizations," stating that the beneficiary "is among the recipients of the 2001 New York Foundation for the Arts fellowship in Performance Art, which is funded by the NYS Council on the Arts, and the NYC Dept. of Cultural Affairs." Documentation from the New York Foundation for the Arts indicates that the beneficiary is one of 19 recipients of fellowships in "Performance Art/Multidisciplinary Work." The documentation does not reflect the exact date that the petitioner received the fellowship, but given the 2001 date of the fellowship, it appears unlikely that the fellowship had been awarded before the petition's September 2000 filing date. The petitioner's initial submission includes no mention of this fellowship, further supporting the conclusion that the beneficiary received the fellowship after the filing date. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

For the reasons explained above, the one specifically claimed instance of recognition strongly appears to have taken place after the petition's filing date and cannot retroactively establish the beneficiary's eligibility as of the September 2000 filing date.

The petitioner has failed to submit credible evidence that the beneficiary qualifies as an alien of exceptional ability in the arts. The remaining issue concerns the petitioner's claim that an exemption from the job offer requirement is in order because the beneficiary's admission would serve the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Diane Skai Stroud, president of the petitioning entity, states that the petitioner seeks to employ the beneficiary as a choreographer, dance instructor, and dancer, and that the beneficiary will be involved with “workshops and presentations at cultural and community organizations” concerning African dance, music, ritual masks and traditions. Ms. Stroud states that the petitioner’s “presentations will cover major cultural centers and organizations across the U.S.,” and that many of these “presentations are and will continue [to] be given pro bono at community organizations working with disadvantaged African-American children.”

While Ms. Stroud indicates that the beneficiary will perform throughout the United States, the record does not establish that the petitioning organization has national reach. Despite instructions on the I-140 petition form that the form must be filled out completely, the petitioner provided almost no information in the section labeled “Part 5. Additional information about the employer.” The petitioner identified the “Type of business” as “Artistic/cultural productions,” but left blank the lines “Date Established,” “Current # of employees,” “Gross Annual Income” and “Net Annual Income.”

Counsel lists three claimed grounds underlying the request for a national interest waiver:

- a) The artistic formation of [the beneficiary] is of a very highly localized nature, m[o]st likely to be acquired locally by native Africans, which renders the search for qualified U.S. workers (and the Labor Certification process) as meaningless and unnecessary.
- b) The artistic presentations and classes conducted by [the beneficiary] in the U.S. enrich the cultural experience of African-Americans, and are a source for pride and connection with their cultural past and ancestors.
- c) About half of the presentations and classes conducted by [the beneficiary] in the U.S. are (and will continue) as pro-bono work, as his contribution to the African-American communities, especially as an opportunity for the cultural and economic advancements of their youth.

The first stated ground, that the labor certification process would not be likely to uncover qualified U.S. workers, is not persuasive. Every labor certification ever approved is approved precisely because no qualified U.S. worker seeks the position offered. Thus, counsel argues in effect that the labor certification is so likely to be approved that there is no point bothering to apply for it.

The second stated ground is a general assertion about individuals who introduce U.S. youth to the folk art of their ancestors. Blanket statements such as this do not demonstrate that the beneficiary is able to “enrich the cultural experience of African-Americans” to a greater extent than others in the same field are able to do. The assertion that the beneficiary will offer many presentations free of charge demonstrates sincerity and generosity, but the burden is on the petitioner to establish that such presentations will have a demonstrably national effect.

The record contains letters from several employers and venues where the beneficiary had given performances and/or presentations. The majority of these letters concern the beneficiary’s activities in Brooklyn, New York, although the beneficiary also worked at the University of Florida in 1999 and taught a two-hour class in Great Barrington, Massachusetts in 1996.

The petitioner submits articles from local newspapers and magazines, attesting to the beneficiary’s skill as an entertainer and instructor.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response to the director’s statement that “[i]t appears that the beneficiary’s employment will benefit only those individuals who find African dance interesting,” counsel has stated “we agree . . . [but] the same could be said of any field of artistic expression.”

Of greater concern is the larger social benefit which, the petitioner claims, arises or can arise from the beneficiary's work. In response to the director's request for "corroborative, independent, documentary evidence" of the significance of the beneficiary's work, Diane Skai Stroud states that she has "had repeated requests for performances by [the beneficiary]. A large segment of these requests come from those who work with children/students." Ms. Stroud asserts that the beneficiary "renders an invaluable service in bridging the cultural divide that still exists." The petitioner submits documentation of the beneficiary's activities on college campuses and cultural centers in the New York area.

The director denied the petition, acknowledging the intrinsic merit of the beneficiary's work but finding that the beneficiary's contribution is not national in scope and does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated "[t]he beneficiary's proposed activities will primarily benefit only the African-American population and those individuals who find African dance interesting."

The director's finding that an activity can benefit "the African-American population" without benefiting the national interest appears to be misworded in a manner that is open to disturbing misinterpretation. One witness, for instance, asserts that the director's finding "borders on prejudice." The Administrative Appeals Office takes exception to the wording of the decision, but because the petitioner has not established the beneficiary's eligibility for the underlying visa classification, it would serve no useful purpose to remand this matter to the director for a new decision limited to the national interest waiver. Without a finding of exceptional ability, any new decision would have to be a denial. Therefore, we will simply explain our objection to the wording of the director's decision while offering a finding regarding the waiver request.

The director, by referring to "the African-American population" without adding any limiting modifiers, such as "in the New York area," appears to refer to the entire U.S. African-American population. The entire African-American population comprises so large a segment of the U.S. population that any effect on that community can reasonably be said to be a national effect. For example, sickle-cell disease is a dangerous genetic disorder found only among some individuals of African descent. Research into that disease, therefore, would directly benefit no one except African-Americans who either suffer from the disease or who carry the gene and whose offspring thus could have the disease. This limitation, however, should not and does not mean that a researcher studying sickle-cell disease is presumptively ineligible for a national interest waiver.

Also, an activity that benefits the entire African-American community would have indirect benefits to the country as a whole. Just as a cure for sickle-cell disease would lower health care and insurance costs, contributions to the socio-economic betterment of African-Americans can resonate throughout American society, because African-Americans do not live in physical or economic isolation from the rest of the U.S. population.

What is important is the degree to which a given alien contributes. In this area, the director's finding appears to be misleading. The director, as noted above, seems to indicate that the beneficiary's efforts benefit the entire African-American community. The petitioner, however,

has not shown that the beneficiary's activities have such broad reach. The beneficiary's efforts have been largely (although not entirely) concentrated in parts of New York City. The petitioner asserts that the beneficiary will ultimately travel throughout the country, but the petitioner has not established that it has the national reach to accomplish this goal.

The petitioner has also failed to demonstrate that the beneficiary's efforts have had a greater social impact than comparable efforts by other individuals engaged in similar activities. While it is admirable that the beneficiary gives educational presentations at local schools, free of charge, he is not the only individual so engaged, and the very nature of his work is not sufficient to demonstrate eligibility for a waiver. There is no blanket waiver in the statute or regulations for individuals who perform at schools and cultural centers for the benefit of disadvantaged populations. When asked for evidence of the beneficiary's impact, the petitioner has essentially responded with a list of venues where the beneficiary has performed. Subjective assessments of the beneficiary's talents cannot suffice as evidence in this regard.

On appeal from the director's decision, counsel states that the beneficiary's "art is unique according to experts in the field, on record, and no artists in the U.S. can provide quite a degree of artistic performance." The director had observed that if the petitioner requires specific skills that are unavailable from U.S. workers, then the labor certification process is a viable means of securing the beneficiary's services. Counsel, on appeal, does not address this finding or specify how the "experts in the field," selected by the petitioner, have sufficient knowledge of cultural educational activities throughout the United States to offer an informed comparison between the beneficiary and others performing similar activities.

On the appeal form, counsel indicated "I am not submitting a separate brief or evidence," and did not indicate that any evidence was forthcoming in future submissions. Shortly after the filing of the appeal, however, the petitioner has submitted numerous additional witness letters. Many of these witnesses are individuals who have taken dance classes under the beneficiary's direction. One of these witnesses is Linda Petrozelli who has taken lessons from the beneficiary "at the Rod Rodgers Dance Company in the East Village of Manhattan." Ms. Petrozelli states "[t]he beneficiary has a very promising future here. It would be a shame to cut down such a beautiful tree before it bears fruit on our soil." At the time Ms. Petrozelli wrote this letter, in November 2001, the beneficiary had been in the United States for ten years, yet the above comments suggest that the beneficiary had not been in the U.S. long enough for his efforts to "bear fruit."

Several witnesses have taken classes from the petitioner at the University of Maine. These activities were not underway at the time the petition was filed; a November 2001 letter states that the workshop began "recently." Thus, if the petition was not approvable at the time of filing, the beneficiary's later work in Maine cannot retroactively establish eligibility. The witnesses in Maine state that they found the beneficiary to be an inspiring and enlightening instructor. While this attests to the beneficiary's skill as a teacher, his impact is necessarily highly attenuated at a national level. Teaching small classes at a variety of locations does not equate to national impact.

The petitioner has submitted additional witness letters dated April 2002, five months after the filing of the initial appeal. A letter from the beneficiary, dated July 29, 2002, is later still. There is no regulation that allows the petitioner an open-ended or indefinite period in which to supplement the appeal. Indeed, the existence of 8 C.F.R. 103.3(a)(2)(vii), which requires a petitioner to request, in writing, additional time to submit a brief, demonstrates that the late submission of supplements to the appeal is a privilege rather than a right. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary.

These additional letters concern activities undertaken by the petitioner in late 2001 and 2002. These materials show that the petitioner continues to perform and offer instruction, mostly in the New York area. The new materials do not overcome any of the previously stated findings. The denial was not based on a finding that the beneficiary has been unable to find work, and therefore a listing of the beneficiary's activities and future commitments is immaterial to the matter at hand.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. The petitioner has also failed to establish that the beneficiary qualifies as an alien of exceptional ability, and the petitioner's submissions in that regard contain contradictory information (placing the beneficiary on two different continents at once) that necessarily casts doubt on the petitioner's overall credibility. The use of questionable evidence in this way also raises further doubts as to whether the beneficiary's admission would be in the national interest, given Congress' unambiguous position that aliens who seek admission based on fraudulent documents are inadmissible to the United States (see section 212(a)(6)(C)(i) of the Act).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.